NANCY WOHL

IBLA 85-300 Decided April 17, 1986

Appeal from decision of the Alaska State Office, Bureau of Land Management, denying a petition for reinstatement of oil and gas lease AA-48932-C.

Affirmed.

1. Oil and Gas Leases: Termination

> Where an oil and gas lessee's annual rental payment was postmarked on the Monday following the anniversary date of the lease which fell on the preceding Sunday, the payment was not timely under the provisions of 43 CFR 3108.2-1(a), even though, under the regulation, the lease payment could have been timely received by BLM on the Monday upon which payment was postmarked. Mailing was not made the equivalent of actual payment nor was the anniversary date of the lease changed by the regulation, which permits payment on the next day following a lease anniversary when the office where payment is to be made is closed on the anniversary date.

APPEARANCES: Theresa M. Walsh, Esq., Cleveland, Ohio, for appellant.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Nancy Wohl appeals from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated December 24, 1984, denying her petition for reinstatement of oil and gas lease AA-48392-C. The original lease, AA-48392, was issued effective July 1, 1983; a partial assignment of 640 acres to Wohl became effective September 1, 1983. Instruction number 4 in the notice of partial assignment, dated August 23, 1983, provides that approval of an assignment does not change the lease anniversary date for purposes of payment of annual rental. The annual rental payment was therefore due on or before July 1 of each year. The 1984 rental fee was tendered by personal check drawn on Wohl's account. The check was dated June 30, 1984. However, this check was not received by the Minerals Management Service, Denver, Colorado, until July 9, 1984. The envelope containing the rental check bears two postmarks, one of which indicates it was postmarked by the U.S. Postal Service, Cleveland, Ohio, on July 2, 1984, while the other shows it was postmarked by the U.S. Postal Service, Denver, Colorado, on July 5, 1984.

On September 4, 1984, BLM forwarded appellant an oil and gas lease termination notice indicating that, pursuant to 43 CFR 3108.2-1(a), appellant's Federal oil and gas lease terminated for failure to pay the annual rental on or by July 1, 1984. See 30 U.S.C. § 188(b) (1982). BLM also informed appellant of her right to petition for reinstatement of the lease pursuant to 30 U.S.C. § 188(c) (1982) (class I reinstatement) or 30 U.S.C. § 188(d) (1982) (class II reinstatement). The BLM lease termination notice set forth the conditions for reinstatement under both class I and class II.

On October 10, 1984, appellant filed a class I petition for reinstatement of oil and gas lease AA-48392-C, contending she had mailed her rental payment in the form of a check on June 30, 1984. On December 24, 1984, the State Office rejected her petition for reinstatement under class I but informed her she could qualify for reinstatement under the provision of class II. She was further informed a petition under class II would be accepted if filed within 30 days of receipt of the decision and accompanied by payment of $ 3,190. BLM premised its rejection of the class I petition on the conclusion that appellant had not mailed her rental payment until July 5, 1984, as indicated by the Denver postmark. Additionally, after review of the facts stated above, BLM concluded appellant had shown neither reasonable diligence nor a justifiable reason for the delay in submission of her payment. Thus, BLM concluded appellant had not made a showing which would justify reinstatement under class I.

In her statement of reasons on appeal, appellant alleges her lease payment was timely and termination of the lease was improper. She asserts her lease anniversary date, July 1, 1984, being on a Sunday and the proper BLM office not open to the public, that the envelope containing her payment postmarked in Cleveland, Ohio, on July 2, 1984, should be treated as timely filed.

[1] The disposition of this appeal is controlled by the decision in Melvin P. Clarke, 90 IBLA 95 (1985), where, as here, a lessee chose to mail his annual rental payment to BLM. Coincidentally, Clarke's lease anniversary date also fell on a Sunday. Clarke's payment envelope was postmarked the following Monday. On its facts, therefore, Clarke is indistinguishable from this case. The Clarke decision held that an oil and gas lease without a well capable of production in paying quantities terminates by operation of law under 30 U.S.C. § 188(b), when the rental payment is not actually received by BLM by the anniversary date or the first business day thereafter (where the office is closed on the anniversary date). Further the Board held that where a late filed rental payment is made by mail, unless the payment is postmarked not later than the anniversary date of the lease, the lessee has not established reasonable diligence under class I, and there cannot be a class I reinstatement of the lease. The Clarke decision is grounded upon a close reading of 43 CFR 3108.2-1(a), which provides, pertinently:

> A remittance which is postmarked by the U.S. Postal Service * * * on or before the lease anniversary date and is received in the proper BLM office or the designated Service office, as appropriate, no later than 20 days after such anniversary date shall be considered as timely filed. [Emphasis supplied.]

43 CFR 3108.2-1(a). Appellant's argument that her lease payment was timely filed under this regulation cannot be squared with the language of the rule itself. Appellant confuses the anniversary date of the lease with the due date of the rental payment, which admittedly would usually be the same day. In this instance, however, the July 1 anniversary fell on a Sunday; thus, had appellant delivered her payment by more direct means so as to arrive at the BLM office on July 2, the following Monday, her payment would have been made when due. The "anniversary," however, would remain July 1. Having chosen to mail her payment, appellant's lease was not eligible for reinstatement because payment was not postmarked on the anniversary date of her lease (which was not changed by the regulation).

Appellant does not claim the benefit of the leasing reinstatement law and does not contend her late payment was either justifiable or not due to a lack of due diligence. Although she seeks "reinstatement" of her lease, it is clear she is not seeking a reinstatement pursuant to any provision of 30 U.S.C. § 188, but instead wishes to obtain a determination that her lease did not terminate, payment having been made in time under current Departmental regulations. For the reasons already given, 43 CFR 3108.2-1(a), does not permit such a finding.

Since 1972 this Board has construed the words and phrases "justifiable" and "not due to lack of reasonable diligence" so as to narrowly limit the relief available to a late payor seeking reinstatement under 30 U.S.C. § 188(c). See Louis Samuel, 8 IBLA 268 (1972), for the leading exposition of the rationale applied by the Department in this line of cases, and the determination that the legislative history of the Act required dual standards of narrowly defined scope should be applied to reinstatement petitions under section 188(c). Applying the Samuel standards to appellant's situation, since she has sought "reinstatement" (despite her avowed rejection of any need to show she exercised reasonable diligence or could justify her tardy payment), it is clear she is not entitled to class I reinstatement. First, she has not satisfied the reasonable diligence standard, since she violated the current Departmental regulation which establishes what diligence is due, when she failed to either present or mail her payment "on or before the lease anniversary." See 43 CFR 3108.2-1(a); Louis Samuel, supra; Melvin A. Clarke, supra. Second, by failing to show the late payment was caused by circumstances beyond her control, such as personal disability or natural catastrophe, she has failed to justify her late payment within the limitations upon that standard established by Samuel and its progeny. See, e.g., Martin Mattler, 53 IBLA 323, 326, 88 I.D. 420-21 (1981) (explaining that justification for late payment could be made by showing tardy payment was caused by "sufficiently extenuating circumstances outside the lessee's control," examples of which include "illness," "injury," or "death"). Since appellant has offered no explanations or excuses of any kind, it is clear she does not intend to claim the benefit of the reinstatement provisions of 30 U.S.C. § 188(c) nor regulations implementing the Act, and she therefore has not shown she is entitled to reinstatement of her lease.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

While in agreement with the result reached in the majority decision, I think that further comment is warranted insofar as appellant's arguments are premised on the application of 43 CFR 3108.2-1(a). That regulation provides, in relevant part:

> A remittance which is postmarked by the U.S. Postal Service, common carrier or its equivalent (not including private postal meters) on or before the lease anniversary date and is received in the proper BLM office or the designated Service office, as appropriate, no later than 20 days after such anniversary date shall be considered as timely filed.

The majority correctly notes that appellant has confused the lease anniversary date with the last day on which a payment may be received and be considered to be timely filed. However, I think it is also important to point out that, to the extent the regulation purports to hold that a payment received after the anniversary date, or when the office is closed on that day, the next day it is open, is timely filed so that the lease does not terminate, the regulation is directly contrary to the applicable law and is, accordingly, of no force and effect. Indeed, the Board has expressly so ruled.

Thus, in William F. Branscome, 81 IBLA 235 (1984), the Board quoted the text of the regulation and then stated:

> The preamble to the final rule reinforces the conclusion evident from the language of the regulatory provision that a late payment received within 20 days of the lease anniversary date will be considered "timely filed" and, thus, not result in the termination of the lease. See 43 FR 33655 (July 22, 1983). We conclude, however, that this interpretation is contrary to section 31(b) of the Mineral Leasing Act, as amended, supra, which provides that a lease terminates by operation of law "upon failure of a lessee to pay rental on or before the anniversary date of the lease." See Anthony F. Hovey, [79 IBLA] at 151 n.1 (Grant, A.J. concurring). We believe that the proper approach is to treat a late payment mailed prior to the anniversary date as satisfying the criterion of reasonable diligence."

Implicit in the interpretation of 30 U.S.C. § 188(b) espoused by the regulation is a view that the statute, which provides that "upon failure of a lessee to pay rental on or before the anniversary date of the lease * * * the lease shall automatically terminate by operation of law," does not require that the payment be received by BLM but merely that it be mailed to BLM by that date. Not only is this contrary to a line of cases going all of the way back to 1954, when this provision was first added to section 31 of the Mineral Leasing Act (see, e.g., Louis Samuel, 8 IBLA 268, 272 (1972) and cases cited), it also runs directly afoul of the language of the Act, itself. Thus, immediately following the termination language quoted above, the Act continues:

"Provided, however, That when the time for payment falls upon any day in which the proper office for payment is not open, payment may be received the next official working day and shall be considered as timely made." (Emphasis supplied.) Thus, Congress has expressly adverted to the need for the payment to be received in order to prevent termination. Mere mailing clearly does not suffice.

Moreover, a review of the legislative history of the Act of May 12, 1970, P.L. 91-245, 84 Stat. 206, 30 U.S.C. § 188(c) (1982), which granted the Department authority to reinstate terminated leases, shows Congress was aware that the late receipt of a payment timely mailed resulted in the automatic termination of the lease.

Thus, H.R. Rep. No. 91-1005, 91st Cong., 2d Sess., noted that one of the major causes of automatic termination was that "the full rental payment was submitted, but was not received timely." Id. at 3. This report also noted other reasons for automatic termination including nominal deficiencies and payment in accord with erroneous lease or billing notices. Id. In assessing the need for legislation, the Report continued:

> It is the opinion of the committee that a general legislative solution is needed to prevent the automatic termination of Federal oil and gas leases due to errors made by the Federal Government. In certain other circumstances, where a lessee fails to pay the full amount of the rental or fails to pay it timely, the committee is also of the opinion a general legislative solution is desirable.

Id.

In fashioning a legislative remedy, Congress pursued a bifurcated approach. Under section 1 of the Act it was noted that "a Federal oil and gas lease will no longer automatically terminate where the rental has been paid on time, if: (1) the payment was or if found to be deficient by a nominal amount, or (2) the lease rental was paid in accordance with a bill issued by the Department but the bill was in error and that error resulted in the deficiency." Id. at 4 (emphasis supplied). Thus, nominal deficiencies or errors caused by the Department would not result in termination of the lease. Section 2, however, provided a mechanism by which leases which had terminated for nonpayment of rentals by the anniversary date could be reinstated upon a showing that the failure to make the payment timely was justifiable or not due to a lack of reasonable diligence. The report noted, however, "The committee wishes to emphasize that reinstatement of an oil and gas lease under the provisions of section 2, where the error, although inadvertent, is entirely the responsibility of the lessee, is not automatic but requires a petition by the lessee." Id.

Contrary to both the clear language and the express intent of the law, the language of the regulation at 43 CFR 3108.2-1(a) purports to expand section 1 of the Act of May 12, 1970, supra, to embrace situations in which

Congress has clearly provided that the lease does, in fact, terminate. While it is a constantly repeated truism that duly promulgated regulations are binding on the public and on the Secretary, the obverse is also true. A regulation which is not duly promulgated is of no force or effect. This, indeed, was the express holding of Garland Coal & Mining Co., 52 IBLA 60, 88 I.D. 24 (1981), which, paradoxically, involved a regulation which purported to apply the automatic termination provisions of 30 U.S.C. § 188(b) (1982) to mineral leases other than those involving oil and gas.

Not only is it clear that the regulation, as written, is substantively contrary to the law, the mode of its adoption raises difficult questions as to procedures used in its promulgation. As originally proposed, the provision, then found as Proposed 43 CFR 3108.2-1(c)(2), read as follows:

> The burden of showing that the failure to pay on or before the anniversary date was justifiable or not due to lack of reasonable diligence shall be on the lessee. However, a remittance which is postmarked on or before the lease anniversary date and is received in the proper BLM office no later than 20 days after such anniversary date shall be accepted as meeting the showing of reasonable diligence required in paragraph (c)(1)(ii) of this section.

47 FR 28565 (June 30, 1982). The clear meaning of this regulation was supplemented by the prefatory notes which stated "This proposed rulemaking would provide that there has been reasonable diligence if the rental payment is postmarked on or before the due date (Section 3108.2)." 47 FR 28550 (June 30, 1982).

As promulgated, however, the regulation underwent a major substantive revision so that it now provided that in cases where the rental payment was postmarked prior to the due date and received within 20 days of the anniversary date, the lease would not terminate. The preamble to the regulation justified this alteration as follows:

> In addition, the final rulemaking makes a modification in this section that carries forward the goal of reducing the regulatory impact imposed on the public by providing that a remittance that meets the provisions of the section shall be considered as timely paid. Under this change, the lease does not terminate and a Notice of Termination will not be sent by the Bureau of Land Management State Office having jurisdiction of the lands covered by the lease and a petition for reinstatement will not be required.

48 FR 33655 (July 22, 1983). I would suggest that, however laudatory the goal of reducing paperwork may be, it does not justify ignoring the clear language

of the controlling statute. 1/ Moreover, while the case law is not clear, I question whether proposing one regulation and adopting a totally different one fulfills the requirements of 5 U.S.C. § 553(b) (1982).

In essence, therefore, appellant's argument has proceeded on an invalid premise, viz., if she had mailed the payment on the anniversary date of the lease, the lease would not have terminated. Notwithstanding the language of 43 CFR 3108.2-1(a), the lease would, indeed, have terminated though, as explained in Branscome, the lessee would have been granted a class I reinstatement upon the timely filing of a petition therefore. This is a distinction which, I believe, is important to keep in mind.

Accordingly, in light of the views I have expressed above, I concur with the majority disposition of the instant appeal.

James L. Burski
Administrative Judge

1/ I must also point out that, contrary to the preamble to the 1983 amendments, the regulation does not provide that rentals timely postmarked but received late are "timely paid." The regulation provides that they will be considered as "timely filed." See 43 CFR 3108.2-1(a). Inasmuch as 30 U.S.C. § 188(b) has no reference to "timely filing," the technical efficacy of the regulation is open to question.